More Leeway for Unilateral Trade Measures?

The Report of the Appellate Body in the Shrimp-Turtle Case

The report of the WTO Appellate Body in the shrimp-turtle case may prove to be of fundamental importance for the development of the GATT/WTO system. It asserts that a WTO member can unilaterally condition access to its market on compliance with environmental policies, as long as the regulations are administered in an even-handed manner and do not amount to disguised protectionism. Will the incidence of unilateral trade measures increase dramatically as a result of this decision?

In October 1998, the Appellate Body of the World Trade Organization (WTO) reaffirmed the panel decision in the shrimp-turtle case that Section 609 of US Public Law 101-162 does not satisfy the requirements of the General Agreement on Tariffs and Trade (GATT) Art. XX (General Exceptions) and is, therefore, GATT-illegal. While arguably confirming the law, the Appellate Body specifically faulted the United States on how it was implemented. The regulations in dispute are designed to protect endangered sea turtles and prohibit the importation of shrimp from countries which permit shrimp harvesting without a certain technology. Although it was criticized by environmentalists, some observers consider the ruling to be a landmark decision that opens up the door for unilateral approaches to the pursuit of international environmental goals. This article will discuss the findings of the Appellate Body in the shrimp-turtle case, which may prove to be of fundamental importance for the development of the GATT/WTO system. Above all, the Appellate Body removes some of the uncertainties previous panels had set up regarding the interpretation of Art. XX. The economic implications and possible aftermath of the ruling as well as some questions it seems to leave open will also be discussed.

The trade-and-environment debate that has captured the attention of trade specialists, environmentalists, politicians and the public involves several distinct categories. One core policy question that has become increasingly relevant is whether unilateral trade restrictions should be allowed that are based not on the nature of a product, but on how it was made, i.e. on differences in domestic production methods. Demands that such restrictions be allowed have two different roots. On the one hand, they are driven by environmental concerns. Trade restrictions are considered necessary in order to protect international environmental resources. Particularly if global environmental commons are threatened by negative impacts of production activities of firms in different countries, measures taken by one single country tend to be inadequate. Imposing trade restrictions can be seen as a means to induce other - otherwise possibly free-riding - countries to take comparable measures or to negotiate a cooperative solution. On the other hand, even if the externalities are purely local, some


3 A market-based alternative is the use of environmental labelling schemes that provide information to consumers on the environmental effects of products. While principally allowing consumers to make choices according to their environmental preferences, environmental labelling can nevertheless discriminate against foreign producers, in particular if the labelling criteria are tied to PPMs. See for a comprehensive analysis S. Zarrilli, V. Jha, R. Vossenaar (eds.): Eco-Labelling and International Trade, Houndmills, Basingstoke 1997; H. Karl, C. Orwat: Economic Aspects of Environmental Labelling, in: H. Folmer, T. Tielenberg (eds.): The International Yearbook of Environmental and Resource Economics 1997/2000, Aldershot, forthcoming.

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observers demand the right for national politicians to restrict imports on competitiveness grounds, or in popular rhetoric, to ‘level the playing field’ or to counteract ‘eco-dumping’. Sometimes, advocates from this group also put forward an environmental motive, the so-called ‘race to the bottom’ argument: it asserts that countries with less stringent environmental standards have an unfair advantage and pull other countries down to undesirably low levels of environmental protection, because they have to compete for mobile investment capital by cutting their standards. While most economists will probably find some merit in environmentally motivated restrictions of trade if they are tied to transboundary or global externalities, the great weight of opinion considers competitiveness-based demands ill-founded and, moreover, does not subscribe to the ‘race to the bottom’ argument.

In contrast to the non-product-related processes and production methods (PPMs) considered here, some PPMs are directly related to important characteristics of the products concerned, i.e. they control negative consumption externalities, typically potential health impacts, e.g. of pesticides. If products are regulated on health grounds, some restrictions to trade are inevitable as probably even the most ardent free trader will admit.4

The US law in dispute in the shrimp-turtle case is a typical non-product-related production process regulation: Section 609 bans imports of shrimp from countries that have not adopted US regulations on the protection of sea turtles from incidental killing during shrimp harvesting. The ban is not imposed because of the characteristics of foreign shrimp itself, but because of the way it is harvested, and it addresses, or at least seems to address, the protection of a global environmental resource rather than the competitiveness concerns of domestic industries. Therefore, the report of the Appellate Body represents the current ‘state of the art’ of WTO jurisprudence and dispute settlement practice relating to this important area of conflict.6

Background of the Shrimp-Turtle Dispute

Due to the destruction of their nesting habitats, harvesting and accidental mortality associated with fishing and most importantly with shrimp trawling operations, all but one species of sea turtles are considered to be threatened or endangered with extinction. Therefore, since 1987 the USA has required fishermen to employ a special equipment known as the Turtle Excluder Device (TED) that significantly reduces incidental killing of sea turtles.4 Two years later, the USA enacted Section 609 of Public Law 101-162.7 According to Section 609, the Secretary of State should initiate negotiations on bilateral or multilateral agreements for the protection of sea turtles with the governments of other shrimp harvesting countries. Furthermore, the law restricts imports of shrimp harvested with fishing equipment that may result in incidental sea turtle mortality, unless the President annually certifies to the Congress that the harvesting country has a regulatory programme comparable to that of the USA, that the average rate of incidental taking by the vessels of the country concerned is comparable to the average rate of incidental taking of sea turtles by US vessels, or that the fishing environment of the harvesting country rules out the endangerment of sea turtles.

However, pursuant to the guidelines issued in 1991 and 1993 for the implementation of Section 609, the law was applied only to countries of the Caribbean/ Western Atlantic.8 The California-based environmental organization Earth Island Institute challenged the guidelines, and in December 1995 the US Court of International Trade (CIT) concluded that the geographical limitation was illegal. Therefore, the CIT

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4 However, the hormone beef controversy between the European Union (EU) and the USA shows that sometimes it is difficult to decide whether a specific PPM is product-related or not. The relevant WTO rules are laid down in the Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT).

5 A related but distinct question is the use of trade restrictions as an enforcement mechanism in multilateral environmental agreements (MEAs). Some environmentalists argue that the GATT/ WTO reports in the tuna-dolphin and shrimp-turtle cases may jeopardize all MEAs which contain trade provisions. However, so far no MEA trade restriction has been challenged, a fact that arguably indicates a broad acceptance of this mechanism. Moreover, both the discussion in the WTO Committee on Trade and Environment (CITE) as well as several remarks in the panel reports seem to suggest that there is a broad scope for trade provisions within MEAs as long as they fulfil certain procedural requirements. Nevertheless, in order to provide predictability and security it might be useful to clarify the legal status of MEAs; the legal literature discusses several options for appropriate GATT amendments. See R. E. Hudec, op.cit., here pp. 120-142 or T. J. Schoeibau: International Trade and Protection of the Environment: The Continuing Search for Reconciliation, in: American Journal of International Law, Vol. 91, 1997, pp. 268-313, here pp. 281-284.

6 A TED is a trap-door that is inserted into a shrimp trawling net. A completely installed TED costs between 75 and 500 US-Dollars, and is estimated to reduce turtle mortality by up to 97%.


8 In September 1996, the United States and a number of countries of that region concluded the Inter-American Convention for the Protection and Conservation of Sea Turtles.